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No. 06-1507

IN THE

# Supreme Court of the United States

PHILADELPHIA HOUSING AUTHORITY,
*Petitioner,*

v.

VANESSA HENDERSON, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

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Respondents argue in their Brief in Opposition that certiorari should not be granted because the Third Circuit's ruling was allegedly correct in that this Court's precedents can require federal courts to keep consent decrees regulating state and local governments in place "indefinitely" (Br. in Opp. at 6) for decades, even where the decree is no longer needed to protect any federal constitutional or statutory rights. That respondents and the Third Circuit can misread this Court's existing precedents this way demonstrates the seriousness of the issue here and the need for review and clarification by this Court.

## I. Respondents' Assertion And The Third Circuit's Ruling That Consent Decrees Regulating State Agencies Can Continue "Indefinitely," Without Any Federal Constitutional Or Statutory Need, Violate This Court's Decision In *Frew v. Hawkins* And The Fundamental Principles Of Federalism

Respondents argue that the Third Circuit's ruling in this case is consistent with this Court's decision in *Frew v. Hawkins*, 540 U.S. 431 (2004), because in *Frew* this Court required that consent decrees remain in effect until "the objects of the decree have been attained." (Br. in Opp. at 5) (emphasis omitted) (quoting *Frew*). Respondents contend that a federal district court may properly be required to continue to enforce the Consent Decree against a state agency "indefinitely," twenty years after all federal due process need for the decree ceased to exist, because under paragraph 13 of the Consent Decree, the "objects of the decree" were allegedly "to provide Tenants with . . . additional benefits indefinitely" (Br. in Opp. at 6) and to provide specific "enduring protections." (Br. in Opp. at 2) (emphasis omitted).

That reasoning is contrary to both this Court's ruling in *Frew* and the basic principles of federalism. In *Frew* this Court did not suggest that consent decrees may regulate state and local government for decades, regardless of the absence of any need for court regulation to protect any federal right, simply because there was an alleged agreement to provide additional benefits "indefinitely." To the contrary, this Court made clear in *Frew* that the "objects of the decree," 540 U.S. at 442, must be viewed in light of and limited by the federal rights which the consent decree was designed to address. This Court specifically held in *Frew* that:

> "[i]f not limited to *reasonable and necessary implementations of federal law*, remedies outlined in consent decrees involving state officeholders may *improperly*

> deprive future officials of their designated legislative and executive powers."

*Frew*, 540 U.S. at 441 (emphasis added).

The Consent Decree in this case is not unusual – it did not stipulate to any duration, indefinite or definite. Indeed, the district court judge who entered the Consent Decree found that there was no agreement that the procedures it provided would remain in place regardless of need or beyond a reasonable time. (App. 66a-68a). The Third Circuit's reasoning that the federal court regulation must continue regardless of need therefore is not limited to this particular decree. Rather, such a rationale could be applied to justify continued and unnecessary court interference with state agencies and officials in countless situations.

Moreover, consent by officials of the Philadelphia Housing Authority ("PHA") holding office in 1982 cannot support long-term regulation of their successor officials 20 years later without any federal need. The limitations which the Constitution imposes on federal regulation of states and state agencies cannot be wholly disregarded on the basis of consent. *New York v. United States*, 505 U.S. 144, 181-83 (1992).

> "[D]eparture from the constitutional plan cannot be ratified by the 'consent' of state officials.
>
> * * *
>
> The interests of public officials . . . may not coincide with the Constitution's intergovernmental allocation of authority."

*New York v. United States*, 505 U.S. at 182-83. Future government policy is not a matter which can be freely contracted away to private parties. *See, e.g.*, Ross Sandler & David Schoenbrod, *Democracy by Decree: What Happens When Courts Run Government* 172-73 (Yale Univ. Press 2003). "The principle that drives representative democracy is that voters should have the power to pressure incumbents to

change policy or replace them with successors who will." *Id.* at 172.

Unchecked federal court regulation of state agencies also violates the Tenth Amendment's limitations, where, as here, a federal agency has promulgated subsequent regulations that provide protection from the same harms that the consent decree was designed to address, *e.g.*, protection of Section 8 recipients' due process rights. "The Constitution's division of power among the three branches is violated where one branch invades the territory of another, whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. at 182. Thus, the sort of interminable "indefinite" court regulation of state officials who administer federally-regulated programs as advocated by the Third Circuit and by the respondents in their brief offends the Tenth Amendment as well as the principles of federalism.

The *permissible* "objects of the decree," to protect federal due process rights, were fully attained long ago. The district court judge who originally entered this Consent Decree held that in light of the subsequent federal regulations, which provided due process protections, there is no longer a need for a court decree to protect any federal right. (App. 12a, 52a). Neither the Third Circuit nor respondents have disputed this fundamental fact. Accordingly, the judgment of the Third Circuit, which requires continued federal judicial regulation of a state agency "for the indefinite future," is incompatible with "the allocation of power within our federal system" and must be reversed. *Board of Education v. Dowell*, 498 U.S. 237, 248, 249 (1991).

## II. Respondents' Claim That The Conflicting Eleventh Circuit Decision In *Hodge* Is No Longer The Law Misinterprets This Court's Decision In *Rufo* And Demonstrates The Need For Further Clarification By This Court

Respondents make a brief one-sentence attempt to distinguish the Eleventh Circuit's decision in *Hodge v. Department of Housing & Urban Development*, 862 F.2d 859 (11th Cir. 1989), on facts irrelevant to the *Hodge* court's reasoning. Respondents point to nothing in the *Hodge* opinion that turned on whether future superseding federal regulations were unanticipated or that turned on the specific language of the consent decree.

Recognizing that the Third Circuit's decision here cannot be reconciled with *Hodge*, respondents argue primarily that there is no conflict because *Hodge* was decided before this Court's decision in *Rufo v. Inmates of Sulfolk County Jail*, 502 U.S. 367 (1992), and is allegedly therefore no longer good law. (Br. in Opp. at 11-13). That argument misreads *Rufo*. In *Rufo*, this Court did not narrow the grounds for modification which had existed under prior law; it *broadened* the grounds for modification of consent decrees regulating government agencies and made the standards *more flexible*. 502 U.S. at 378-83. This Court directed in *Rufo* that courts "should exercise flexibility in considering requests for modification of an institutional reform consent decree." 502 U.S. at 383. The fact that *Hodge* predates *Rufo* therefore does not diminish its validity.

Unfortunately, however, respondents' misunderstanding and cramped reading of *Rufo* is not unique. Language from *Rufo* has been used by parties and the lower courts to require lengthy hearings and erect hurdles to modification and vacatur of outdated and unnecessary consent decrees. *See generally, e.g.*, Sandler & Schoenbrod, *supra*, at 174-78. That respondents and the Third Circuit invoke *Rufo* to require a district

court to keep in place a now 25-year-old unnecessary consent decree demonstrates the need for this Court to address this problem.

In any event, the issue is whether there is a conflict between the circuits. Courts in the Eleventh Circuit hold that *Hodge* remains valid precedent after *Rufo* on the precise issue here, subsequent enactment or promulgation of hearing procedures as a ground for vacatur of a due process consent decree. *See, e.g., Lynch v. Sessions*, 942 F. Supp. 1419, 1426-27 (N.D. Ala. 1996). Thus, the conflict exists regardless of the merit or lack of merit in respondents' contentions.

### III. Respondents' Claim That *Rufo* Requires A Showing Of An "Onerous" Burden Mischaracterizes This Court's Standards In *Rufo* For Modification Of Consent Decrees

Respondents' final contention is that the Third Circuit correctly required the Consent Decree to remain in effect because *Rufo* allegedly requires that a state agency seeking modification of a consent decree show that post-decree events "have made it 'substantially more onerous' for it to comply with the Decree." (Br. in Opp. at 14) (quoting *Rufo*). That argument again misstates this Court's holding in *Rufo*.

In *Rufo*, this Court did *not* hold that a showing of substantial burden or expense is required before a government agency can obtain modification of a consent decree. Rather, this Court held that modification is warranted where there is a significant change in law or factual circumstances. *Rufo*, 502 U.S. at 384. This Court held in *Rufo* that modification should be granted where a significant change in law has occurred which alters the appropriateness of the decree, regardless of whether there is any claim of burden. *Rufo*, 502 U.S. at 388.

Respondent's attempt to characterize the expenses the decree imposes on PHA as innocuous or "weightless" (Br. in Opp. at 14-16) is, moreover, inaccurate. Requiring a govern-

ment agency to divert limited resources to pay persons who do not contest that they were properly terminated from the program is not harmless or insignificant. The restrictions the Consent Decree imposes on the persons who can serve as hearing officers were specifically found by the United States Department of Housing and Urban Development to be "detrimental to the Section 8 participants." 49 Fed. Reg. 12215, 12229-30 (March 29, 1984). Indeed, respondents' minimizing of the impact of the consent decree directly contradicts their argument that the "additional benefits" provided by the decree are of sufficient importance to justify requiring court regulation of a government agency to continue indefinitely decade after decade.

Most importantly, however, the harm to the public interest from unnecessary long-term regulation of government agencies by consent decree cannot be measured solely by burden and expense of a particular decree. A consent decree regulating government officials intrudes on the ability of the responsible officials to make decisions on how best to allocate limited resources in the management of government programs and interferes with the fundamental federal structure set by the Constitution. *Frew*, 540 U.S. at 442 (consent decrees regulating government officials interfere with the ability of "officials, both appointed and elected, to bring new insights and solutions to problems allocating revenue and resources"); *Rufo*, 502 U.S. at 381 (consent decrees regulating government officials "reach beyond the parties involved directly in the suit and impact on the public's right to sound and efficient operation of its institutions") (quoting *Health v. DeCourcy*, 888 F.2d 1105 (6th Cir. 1989); *see also Rizzo v. Goode*, 423 U.S. 362, 379-80 (1976). The fact that the program here, the Section 8 housing program, is a federal program does not change this. The program at issue in *Frew* was likewise a federal program, and this Court held in *Frew* that where state officials "administer a significant federal program, principles of federalism require that state officials with front-line re-

sponsibility for administering the program be given latitude and substantial discretion." 540 U.S. at 442.

The judge who originally entered this decree returned to PHA's officials discretion over due process hearings for Section 8 housing program participants. The Third Circuit violated this Court's dictates in reversing the lower court's decision and in taking administration of this aspect of the Section 8 program away from PHA's current officials, officials who have no history of violating participants' due process rights. At the same time, PHA is not bound by court or respondents' oversight in administering due process hearings for conventional public hous ing participants, as the decree that once governed such hearings was ordered vacated by a different panel of the Third Circuit that included Justice Alito. *See Brown v. Philadelphia Housing Authority*, 350 F.3d 338 (3d Cir. 2003). The absurdity of the Third Circuit's direction of "indefinite" court interference with half of PHA's operations, while permitting PHA's officials to exercise their discretion with respect to the other half on the same subject matter, cries out for action by this Court.

## CONCLUSION

The petition for Writ of Certiorari should be granted and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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